No. 96-1149

Supreme Court, U.S.
FILED
FEB 19 1997
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY AND CHARLES J. SCHAFFER, JR., its administrator and fiduciary,

Petitioners,

v.

FEDERAL EXPRESS CORPORATION; THE FLYING TIGER LINES, INC.; WARREN TRANSPORT, INC.; TIGER INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Whether the Arbitrator, the District Court for the District of Delaware and the unanimous panel of the Court of Appeals for the Third Circuit, correctly applied well-established principles of law to this voluminous record in determining that the buyer, Hall's Acquisition Corporation and the seller, Tiger International, Inc., did not have evasion or avoidance of withdrawal liability as a principal purpose in the sale of Hall's Motor Transit Company, Inc. for purposes of 29 U.S.C. § 1392(c).

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent before this Court is Federal Express Corporation. In 1989, Federal Express Corporation merged with Tiger International, Inc., whose former subsidiaries included The Flying Tiger Line, Inc. and Warren Transport Company, Inc. The surviving entity's name is Federal Express Corporation.

Pursuant to Rule 29.6 of the Rules of the Court, Respondent, Federal Express Corporation, states that it has no non-wholly owned subsidiaries and no parent company.

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Supreme Court Rule 29.6 ii

No. 96-1149

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THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY AND CHARLES J. SCHAFFER, JR., its administrator and fiduciary,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Respondents, Federal Express Corporation, The Flying Tiger Line, Inc., Warren Transport Company, Inc. and Tiger International, Inc. (collectively hereinafter referred to as "Fed-

eral Express")[1] respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Judgment Order of the Court of Appeals for the Third Circuit ("Judgment Order").

In its Judgment Order, the Court of Appeals for the Third Circuit affirmed the District Court for the District of Delaware's Memorandum Opinion and Order which confirmed and enforced a statutory Arbitration Award, which was accompanied by an 83-page decision by the Arbitrator. This Arbitration Award held that Federal Express was not liable to Petitioners, Teamsters Pension Trust Fund of Philadelphia and Vicinity, *et al.* (the "Fund") for withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 ("MPPAA" or "the Act") arising out of Federal Express' acquisition of Tiger International, Inc. (2a, 72a).[2]

I. PROCEDURAL BACKGROUND

In March, 1986, Hall's Motor Transit Company, Inc. ("Hall's"), a former wholly-owned subsidiary of Tiger International Inc. ("Tiger"), filed for bankruptcy in the Middle District of Pennsylvania, and within a period thereafter, ceased contributing to certain multiemployer pension funds. Judicial proceedings followed under MPPAA in which both parties sought declaratory and injunctive relief.[3] Tiger initiated arbitration pursuant to Section 4221 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001, *et seq.* to review the withdrawal liability assessment the Fund

[1]In 1989, after the events giving rise to this case, Tiger International, Inc. and its subsidiaries, The Flying Tiger Line, Inc. and Warren Transport Company, Inc., merged with Federal Express and the entity's name was changed to Federal Express Corporation.

[2]References to the Appendix accompanying the Fund's Petition for a Writ of Certiorari are abbreviated herein as "___a.". References to the Petition for Writ of Certiorari are abbreviated herein as "Pet. ___". References to the Joint Appendix in the Court of Appeals below are abbreviated herein as "JA ___".

[3]The Court of Appeals for the Third Circuit held that the issues in this case were subject to statutory arbitration. *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia*, 830 F.2d 1241 (3d Cir. 1987).

claimed against Tiger and two of its subsidiaries, The Flying Tiger Line, Inc. ("Flying Tiger") and Warren Transport Company, Inc. ("Warren").

By stipulation, the parties selected a highly experienced and expert Arbitrator, the former Executive Director (from 1979 to 1982) of the United States Pension Benefit Guaranty Corporation ("PBGC"), Robert E. Nagle, Esquire.[4] The core issue before the Arbitrator was the Fund's contention that Tiger's sale of Hall's had as "a principal purpose" the evasion or avoidance of withdrawal liability, a withdrawing employer's proportional share of a multiemployer pension plan's unfunded vested benefits. *See* 29 U.S.C. §1381.

A. The Arbitrator's Decision.

After extensive discovery proceedings, 5 days of hearings, consideration of 19 depositions consisting of over 3,000 pages, hearing transcripts, over 365 exhibits, and extensive briefs filed by the parties, the Arbitrator, on December 22, 1993, issued an 83-page Opinion and Award (the "Award"). Arbitrator Nagle considered and rejected the Fund's arguments that Federal Express was liable for withdrawal liability under the standards the Fund argues are articulated in both *Dorn's Transportation v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986) and *Santa Fe Pacific Corp. v. Central States, S.E. & S.W. Areas Pension Fund*, 22 F.3d 725 (7th Cir.), *cert. denied*, 115 S. Ct. 483 (1994). (107a-108a, 113a-135a).

Arbitrator Nagle held that Tiger's sale of Hall's was not a transaction which had as a principal purpose to "evade or avoid" withdrawal liability, and therefore, that Tiger was not

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[4]Despite the parties' mutual selection of Arbitrator Nagle and his qualifications, the Fund continues to attack the credibility of Arbitrator Nagle, simply because the Fund disliked his decision. (Pet. at 17). An example of the Fund's unwarranted attack on the Arbitrator's credibility and character is found in its Reply Brief in the Court of Appeals below, wherein the Fund stated that Arbitrator Nagle exhibited "odd behavior" and that "One line of Byzantine thought attributes the award to a desire of the Arbitrator to continue his governmental mission at PBGC by forcing an appeal to limit the scope of *Dorn's*." Fund's Reply Brief at 5.

responsible for Hall's withdrawal liability. (142a). Specifically, Arbitrator Nagle held ". . . I conclude that Bodford as purchaser did not have as a purpose to evade or avoid withdrawal liability nor to enable the seller to do so. . . .", and also held that the seller, Tiger's reasons for selling Hall's were "plausible and valid." (113a, 121a). Additionally, Arbitrator Nagle held that Tiger was not responsible for Hall's withdrawal liability under the Fund's then so-called "Accrual Theory": "I conclude that the accrual theory is invalid and provides no basis for the Fund's assertion of withdrawal liability against Tiger." (142a.)

B. The District Court's Confirmation Of The Arbitrator's Award.

The parties subsequently filed motions and actions in the United States District Court for the District of Delaware, which were consolidated. After extensive briefing by the parties, and upon consideration of the entire record before Arbitrator Nagle, the District Court granted Tiger's Motion to Confirm and Enforce the Award and denied the Fund's Motion to Vacate the Award. (22a). The District Court held that the Arbitrator made no error in his numerous and explicit factual and legal findings and determined that Federal Express was not liable for any withdrawal liability under the *Dorn's* and *Santa Fe* standards. (13a-17a). Additionally, the District Court also rejected the Fund's convoluted "Accrual Theory" of withdrawal liability and held that "the accrual theory is invalid under ERISA/MPPAA". (18a-21a).

C. The Court Of Appeals' Affirmance Of The District Court.

After briefing and oral argument before a three-judge panel (Nygaard, Lewis, and McKee, JJ.) held on August 7, 1996, the Court of Appeals affirmed without opinion the District Court's affirmance of the Arbitrator's Award in a Judgment Order entered on August 20, 1996. (2a). The Fund's Petition for Rehearing by the Panel and Suggestion for Rehearing *In Banc* was denied on October 21, 1996. (26a).

II. FACTUAL BACKGROUND

The Fund distorts and misstates the facts. Contrary to the Fund's contentions that Tiger was motivated to sell Hall's in order to avoid withdrawal liability, that the transaction was a "sham", and that the sale was a "gift" to the buyer Bodford (Pet. at 7-10), the Arbitrator, the District Court, and the Court of Appeals found exactly the opposite.

The Arbitrator's findings of fact are entitled to deference and are "rebuttable only by a clear preponderance of the evidence" — in other words, a finding of clear error. *See* 29 U.S.C. §1401(c); *Central States, Southeast and Southwest Areas Pension Fund v. Crown Cork & Seal Co., Inc.*, 982 F.2d 857 (3d Cir. 1992), *cert. denied*, 508 U.S. 972 (1993). (10a). Petitioner simply seeks to reargue in this Court its thrice-rejected factual contentions in this case and have this Court repeat the same fact-intensive record review three different tribunals have already conducted.

Petitioner's one-sided, inaccurate account of the facts is placed in its proper context by a consideration of the facts that the Arbitrator, the District Court and the Court of Appeals found compelling. During late 1979 through 1981, Tiger acquired three trucking companies. One of these was Hall's. By the end of 1981, Hall's had begun to experience net operating losses, which continued each year until its eventual sale by Tiger. (JA 1000-1010, 1132).

Hall's financial situation was only part of the financial nightmare facing Tiger and its major subsidiaries. By the end of 1982, Tiger and several of its subsidiaries were experiencing cash shortages. (JA 1156, 1163, 1165, 1226). On February 14, 1983, Flying Tiger, North American and several other Tiger subsidiaries declared a moratorium on payments of principal and interest in its debt, and invited lenders to renegotiate new terms and payment schedules. (JA 1286-1341, 7001-7004). Hall's debt restructuring was among the first to be accomplished. In December, 1983, Flying Tiger, Tiger's principal subsidiary, restructured all its debt in an Override Agreement.

The Override Agreement contained onerous financial conditions. Even after restructuring its debt in April, 1983, Hall's continued to experience operating losses. (JA 4026-4076). Beginning in March, 1984, Wayne Hoffman, Tiger's Board Chairman and Chief Executive Officer, asked James Cronin, then a Vice President of Tiger, President of TigerAir, and Assistant to Tiger's Chairman, to evaluate the Hall's situation. Cronin was named President of Hall's in May, 1984. (JA 5173-5174, 7521).

Hoffman was optimistic that the Hall's financial situation could be turned around if it had the right leadership and could cut costs. (JA 5045, 5172-5173). Although Cronin made initial progress, he predicted a cash shortfall during the first quarter of 1985 of approximately $5 million. (JA 5068). Hall's then CFO, Alvin Bodford ("Bodford"), complained from the start that *he*—not Cronin—should have been named President of Hall's. Bodford offered approximately $15 million for one hundred percent (100%) ownership of Hall's, which would have covered the approximately $10 million of intercompany debt and would have provided $4 to $5 million in cash to Tiger. (JA 4152-4154). The only condition was that an employee stock ownership plan ("ESOP") be in place at the time of sale. Cronin testified that Bodford's offer was inadequate because, with an ESOP in place, Hall's was worth more. Cronin recognized that if Tiger could successfully establish an ESOP, Hall's would be instantly profitable. (JA 5093).

Hall's atypical labor costs were a significant cause of its unprofitability. Cronin explored the possibility of securing wage concessions in return for an ESOP with an ESOP consultant and the Teamsters officials. Cronin concluded that as long as Tiger owned Hall's it would be difficult to obtain such concessions. (JA 5133, 5137, 5342, 5347).

Although Bodford had never been told an "ESOP was not possible while Tiger owned Hall's," Bodford acknowledged that it would "be more difficult to get the Teamsters' blessing for an ESOP while Tiger owned Hall's." (JA 4481). Cronin met with John Lafferty, the Arthur Andersen engagement partner on the Hall's account on October 5, 1984. Lafferty's memorandum memorializing Cronin's efforts with respect to the ESOP

pointed out that the Company had to make some important strategic decisions, also noting other options Tiger Management was considering, including outright sale, a joint-venture, a restructuring, and a capital infusion by Tiger. (JA 6151).

By letter agreement dated November 1, 1984, Tiger engaged Alex. Brown & Sons, Inc. ("Alex. Brown"), an investment banking firm with trucking industry experience, to devise a plan to maximize Hall's value. Alex. Brown's engagement was not limited to selling Hall's, but also reflected Tiger's willingness to consider other arrangements, including merger, acquisition or investment. (JA 4130, 5072-5073, 6150).

On December 5, 1984, North American and its parent, Tiger Leasing Group Inc. filed a voluntary Chapter 11 Bankruptcy Petition. As a result of this bankruptcy filing, funds could no longer be up streamed from North American. Funds could also not be up streamed from Flying Tiger. Tiger now could not provide the necessary financial breathing room to Hall's to implement an ESOP—at that point considered essential to Hall's turnaround. (JA 5122, 5178). North American's bankruptcy and the attendant publicity also heightened the negatives of Hall's association with Tiger.

As part of the settlement with the North American lenders holding Tiger's collateral, Tiger agreed to a public offering, in early 1985. As the Arbitrator correctly found, these developments made it important for Tiger to sell Hall's:

> The consequences of the North American Bankruptcy left Tiger particularly desirous of finding a purchaser for Hall's by the end of 1984. The major considerations appear to have been (1) the constraints that now existed upon the further use of Flying Tiger as a source of cash, and (2) the forthcoming public stock offering and the S-1 registration statement that would be filed in connection with that offering. (86a).

On November 13, 1984, Alex. Brown mailed a selling memorandum to potential purchasers. At a December 12, 1984, meeting with Cronin and other Tiger representatives, Whit Lee ("Lee"), an interested prospective purchaser, proposed a pur-

chase of all of Hall's stock for a $10 to $15 million note, which included the $10 million pre-existing debt owed by Hall's to Tiger. At the meeting, Lee and an associate, LeGrand Price ("Price"), learned that Tiger was anxious to close before the end of the year. Price's notes of the meeting contain references such as *"want deal cut before S-1"* and *"want to close not letter of intent"*. (JA 2490-2495). Learning this, Lee changed his proposal, offered to pay $1,000 in cash for one hundred percent (100%) of Hall's stock, offered to leave in place Hall's debt to Tiger up to $10.5 million, and offered to secure that debt, the deal to be subject to existing lenders' consent or to refinancing of the debt of any consenting lender. (JA 2496-2498).

Although Tiger had believed it desirable to resolve the Hall's situation by year-end, with North American's bankruptcy filing on December 5, 1984, the elimination of North American and Flying Tiger as cash sources, and the growing burden of keeping Hall's financially afloat, solving Hall's problems immediately became imperative. The ESOP and a $5 million cash infusion by a third party now also assumed urgent importance. On December 19, 1984, Lee and Cronin met with Hall's lenders. Bodford was also present. The lenders, whose consent was necessary to consummate the transaction, made it clear they would approve no transaction in which any significant amount of money went to Tiger rather than going to Hall's or being paid back to the lenders. (JA 5086).

During the December 19, 1984 meeting, Bodford abruptly announced he would meet Lee's offer. (JA 4421-4426). The lenders then met separately with Bodford, and preferred Bodford to Lee. As the Arbitrator found, Bodford and his existing management group were the known commodity. Lender Walter E. Heller Co.'s ("Heller") representatives were alarmed by Lee's threat to use bankruptcy filings to force renegotiation of union contracts. The Arbitrator summarized the deal that evolved:

> The proposed transaction that finally emerged from these meetings provided for Bodford and other senior members of Hall's management to form a corporation, Hall's Acquisition Corporation ("HAC"), that

would purchase 75% of Hall's stock from Tiger. HAC would pay Tiger $1,000.00 in cash and Tiger would receive a secured note for $10.5 million of the existing intercompany debt, such security to be subordinated to that of the lenders. Tiger would retain a 25% interest in Hall's and would have the right to name one director to the Hall's board. Tiger would pay the costs of closing the transaction (including Alex. Brown's fees) amounting to some $1 million, and would continue for up to one year its existing guarantees of certain of Hall's self-insured workers' compensation obligations. Tiger retained the right to cancel the sale if $5 million in new financing promised by Heller were not forthcoming by January 31, 1985. The purchaser would agree to cause Hall's to continue contributing to the various pension plans, and at substantially the same levels, as Hall's had contributed in the past.

With respect to the lenders, Heller would agree to lend up to an additional $5 million in return for a first lien on all unencumbered real estate and rolling stock, and would receive warrants which could be exercised to obtain a 12-1/2% interest in Hall's. (90a).

Lender Heller imposed important conditions and insisted on establishment of the ESOP. In recommending that Tiger sell Hall's to Bodford, *Cronin gave no consideration whatsoever to Hall's potential withdrawal liability.* (JA 5194-5195). In addition, Alex. Brown's recommendation to Hoffman and the Tiger Board to sell Hall's to Bodford summarized the considerations. They did not so much as mention withdrawal liability or MPPAA. (JA 3000-3003).

In a telephone meeting on December 31, 1984, the Tiger Board of Directors approved the sale. Six Directors were present, including former President of the United States, Gerald Ford. The Board's resolution recorded its reasons for approving the sale. There was neither consideration of, nor any mention of, withdrawal liability. (JA 2614).

Tiger's sale of Hall's to Bodford closed on January 7, 1985. Three weeks later Heller funded its $5 million commitment. Seventy-five percent of Hall's stock went to HAC, Bodford's acquisition company. Hoffman regarded as fair the sale of 75% of Hall's shares for (i) $1,000; (ii) the $5 million capital infusion by Heller; (iii) the granting of a $10.5 million secured note; and (iv) the retention of twenty-five percent (25%) of Hall's shares. (JA 5212).

Immediately after the closing, Hall's began negotiations with the Teamsters to establish an ESOP. (JA 5212). The ESOP was announced May 6, 1985. Total savings to the Company generated by the ESOP, estimated at approximately $77 to $80 million, contributed to a fourth-quarter operating *profit*. The difficulties that arose thereafter were unanticipated.

Hall's began to lose key management personnel. As Heller later complained to Bodford, *"[had] Heller known that substantially all of the management team that was to have participated in the management buyout of Hall's would leave the Company in 1985, it is highly unlikely that Heller would have financed the buyout transaction."* (JA 7473, 7523-7529). Given Heller's $5 million, creation of the ESOP and the final disassociation from Tiger, there was no reason to suppose this development could have been foreseen when Hall's was sold to Bodford in December, 1984. In mid-November, 1985, Bodford asked Tiger to give up both its 25% interest in Hall's, and its lien on Hall's assets which secured the $10.5 million obligation from Hall's to Tiger. Given his efforts, and risks, he felt that *he* alone should be the owner. (JA 3425-3426). He also believed he would be unable to secure essential additional financing as long as Tiger held a security interest in Hall's assets. Tiger subsequently entered into an agreement to relinquish its twenty-five (25%) share. (JA 3442-3453). Hall's was unable to obtain additional funding. The company filed a Chapter 11 Bankruptcy Petition on March 10, 1986. By the end of 1987, Hall's had ceased making contributions to various Teamster multiemployer pension plans.

REASONS FOR DENYING THE WRIT

I. REVIEW OF THE COURT OF APPEALS' JUDGMENT ORDER WOULD NOT REQUIRE THE COURT TO RESOLVE ANY ALLEGED CONFLICT BETWEEN THE CIRCUIT COURTS.

The Fund incorrectly suggests that this case presents the Court with the ability to resolve an alleged "conflict" between the circuit courts, arguing that the Court of Appeals for the Third Circuit's decision in *Dorn's Transportation v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986), "conflicts" with a decision of the Court of Appeals for the Seventh Circuit, in *Santa Fe Pacific Corp. v. Central States, S.E. & S.W. Areas Pension Fund*, 22 F.3d 725 (7th Cir.), *cert. denied*, 115 S. Ct. 483 (1994). (Pet. at 17, 19). It is noteworthy, however, that in the Court of Appeals the Fund posited *Dorn's* evade or avoid interpretation as dictum and not as a conflict with the Seventh Circuit's decision in *Santa Fe* or any other circuit court.[5]

The Fund's position with respect to the alleged "conflict" rests only on the decisions of two circuit courts — the Third and Seventh Circuits — and their interpretation of the "evade or avoid" provision contained in 29 U.S.C. § 1392(c). (Pet. at 15-23). Therefore, the issue — if there is an issue — is not a frequently occurring one. Any alleged "conflict" is also too premature to require the Court's attention.

A. The Arbitrator's Alternative Holdings *Rejected* The Fund's Position Under Both Legal Standards.

Putting to one side the question of whether there is any conflict at all and the relative lack of importance of the statutory construction issue involved, the short answer to the Fund

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[5]Thus, Federal Express asserts that a strong argument can be advanced that the Fund has waived any contention that this case presents a two-circuit conflict, and the issue involved in the alleged "conflict" is arguably not properly before this Court.

is that this case does not even present the issue. Arbitrator Nagle anticipated that the Fund would seek subsequent judicial review, and applied not only the *Dorn's* standard, but also the *Santa Fe* standard. The Arbitrator alternatively evaluated the evidence under the legal standard the Fund asserts was adopted by the Seventh Circuit in *Santa Fe* in which the seller's purposes for the sale alone are examined to determine whether a principal purpose of a transaction was to evade or avoid withdrawal liability. (113a).

After concluding that the buyer had *no purpose* to evade or avoid withdrawal liability (113a), let alone *a* principal purpose, the Arbitrator expressly considered separately "the evidence bearing on Tiger's purpose in selling Hall's":

> Notwithstanding the foregoing conclusion, I recognize that the Fund has based its case mainly on the proposition that despite the language of the *Dorn's* decision, it is the seller's purpose alone that is controlling in the present circumstances. *Accordingly, in view of the prospect of further review of this matter based on that position, I believe it appropriate to consider the evidence bearing on Tiger's purpose in selling Hall's.* (113a) (emphasis added).

Applying this standard the Arbitrator concluded that the seller had no purpose to evade or avoid withdrawal liability, and thus found in favor of Federal Express. (116a-135a). Moreover, the District Court agreed with the Arbitrator, distinguished the facts of this case from those of *Santa Fe*, and found in favor of Federal Express under *Dorn's* and the *Santa Fe* analysis as well. (16a-18a).

Since the Arbitrator and the District Court expressly considered and analyzed *both* of the allegedly "distinct" standards, and on *both* standards found for Federal Express and against the Fund, no "conflict" between those two circuits (if there were one) is even remotely presented by this case. Thus, this case is not an appropriate one in which to resolve the alleged "conflict ".

B. The Fund's Empty Speculation Concerning The Supposed Basis For The Court Of Appeals' Judgment Order Provides No Basis For Review By This Court.

The Fund attempts to wring from the one-line Judgment Order of affirmance some insight into the Court of Appeals' reasoning in this case and, in particular, the Court of Appeals' interpretation of the "evade or avoid" provision of 29 U.S.C. § 1392(c). This, of course, is unhelpful hyperbole and exaggeration. The Third Circuit affirmed the District Court in a Judgment Order which did not detail the Court's reasoning. It simply provided that it affirmed the District Court's decision for *"essentially the same reasons set forth in the District Court's Opinion"*. (2a-3a). In its essence, the District Court's Opinion confirmed the Arbitration Award on *both* grounds. (13a-18a). There is no basis for speculating that the Court of Appeals analyzed this case *only* under its previous decision in *Dorn's*.

Any "conflict" between *Santa Fe* and *Dorn's* is entirely academic in this case. The Arbitrator and the District Court rejected the Fund's factual contentions under the reasoning contained in *both*. (16a, 113a). The Court of Appeals affirmed in a Judgment Order. (3a-4a).

The Petition should be denied.

II. THE COURT OF APPEALS' JUDGMENT ORDER INVOLVED ONLY THE ROUTINE APPLICATION OF ESTABLISHED PRINCIPLES TO A VOLUMINOUS FACTUAL RECORD THAT HAS ALREADY BEEN CAREFULLY REVIEWED BY THREE TRIBUNALS.

The Fund suggests that the issue involved is "important to prevent dumping of unfunded pension liability . . . on other employers and the federal government." (Pet. at 23). This case presents the Court with no such important public policy issue. Further review in this case would only entail the application of established legal principles to an extensive factual record.

The Fund enjoyed a full and fair opportunity to present its case and its theories to three tribunals below. The parties conducted extensive discovery by way of deposition and document production prior to the Arbitration. The Arbitration took place in three cities over a period of five days. The parties *mutually* selected a highly-regarded and experienced Arbitrator, who made explicit factual findings and credibility determinations, including those of both parties' expert witnesses. The Arbitrator's Decision consisted of 83 pages of facts and analyses. The facts and inferences contained in this case have been thoroughly reviewed and analyzed by the Arbitrator, the District Court and the Court of Appeals. The appellate record in this fact-intensive case alone consisted of eight volumes of materials totaling 4,916 pages of exhibits, testimony and other materials. It is respectfully submitted that reassessment by this Court is neither appropriate nor necessary.[6]

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[6]The Fund argues that the Arbitrator's factual findings on the issue of evasion or avoidance of withdrawal liability should not be afforded any deference and mischaracterizes the Arbitrator's findings as "inferences". The Fund also cites an inapplicable tax case in support of its argument. (Pet. at 23.) The Fund's argument is baseless, a clear misstatement of the law, and conflicts with the case the Fund relies so heavily on, *Santa Fe Pacific Corp. v. Central States, S.E. & S.W. Areas Pension Fund*, 22 F.3d 725 (7th Cir.), *cert. denied*, 115 S. Ct. 483 (1994). The District Court properly found that the Arbitrator made explicit factual findings of the motives of the parties. (16a). Some of the Arbitrator's findings are inferences. These too are reviewed under a clearly erroneous standard of review. *Santa Fe*, 22 F.3d at 726-728. (Arbitrator's factual findings and any factual inferences on issue of whether company's purpose was to evade or avoid withdrawal liability to be reviewed only for clear error.)

In addition, the Arbitrator correctly applied the presumption of correctness which is afforded the Fund's determinations, as provided in 29 U.S.C. §1401(a)(3)(A) and as articulated in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust For Southern California*, 508 U.S. 602 (1993). The District Court in this case properly held that the Arbitrator correctly applied this presumption and rejected the Fund's reargument of its version of the facts: "This court finds that the arbitrator did correctly articulate the presumption and burden of proof, and there is no indication that he did not fully understand and apply them in this case." (12a-13a).

A. The Arbitrator Affirmed By the District Court and the Court of Appeals Correctly Decided This Case Under The Standards Articulated In Both *Santa Fe* And *Dorn's*.

The Fund seriously mischaracterizes the Third Circuit's holding in *Dorn's* to require proof that a party had "wilful criminal intent" to be found liable under 29 U.S.C. § 1392(c). (Pet. at i, 17). The Court held no such thing in *Dorn's*. It held that both parties to a transaction must act collusively in some manner, or the transaction has to be a "sham", in order to satisfy the Act's "evade or avoid" as "a principal purpose" of any transaction standard. *Dorn's*, 787 F.2d at 902. There is no requirement of any finding of "wilful criminal intent" in the statute. Contrary to the Fund's assertions, *Dorn's* clearly does not suggest otherwise.

The Arbitrator in this case correctly applied the *Dorn's* standard and held — not that evasion or avoidance of withdrawal liability was not "a principal purpose" — but that the buyer in this case did not have *"any purpose"* of evading or avoiding withdrawal liability:

> It thus appears that the Court viewed Section 4212(c) [of MPPAA] as applying, at least in transfer of business transactions, only to efforts to escape withdrawal liability through collusion or sham arrangement. [Footnote omitted].
>
> The point is important here because whatever purpose Tiger might have had in selling Hall's — and those purposes are considered at length below — *the Bodford-led HAC clearly did not have any purpose* of evading or avoiding withdrawal liability in purchasing the company, *nor does the Fund seriously so contend.* (107a-108a) (emphasis added).

There was no basis for finding "sham", "collusion" or "self-dealing". The Arbitrator specifically found *no* "sham transaction", *no* "collusion" and *no* "self-dealing". *A fortiori* there was no basis on which the Arbitrator could have found that "a *principal* purpose" of the transaction was to evade or avoid withdrawal liability.

The Court of Appeals and the District Court affirmed the Arbitrator's holding that Federal Express was not liable under *Santa Fe Pacific Corp. v. Central States, S.E. & S.W. Areas Pension Fund*, 22 F.3d 725 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 483 (1994). In *Santa Fe*, the Seventh Circuit held:

> The statutory criterion is . . . whether the avoidance of withdrawal liability by the seller (not necessarily by the purchaser as well) is one of the principal purposes of the transaction.

Santa Fe, 22 F.3d at 729-30. The Fund argues that to impose withdrawal liability, the Seventh Circuit's *Santa Fe* formulation requires a finding that a principal purpose of a transaction for the seller was to evade or avoid withdrawal liability. (Pet. at 19-20). In this case, the District Court properly distinguished the facts of *Santa Fe* and found it unsupportive of the Fund's position. (16a). The Court of Appeals affirmed the District Court's holding that the Arbitrator made no clear error in his findings on this issue. (17a).

After carefully examining the record evidence on Tiger's purpose in selling seventy-five percent (75%) of its stock in Hall's, Arbitrator Nagle decisively rejected the Fund's position as without substantial credible record support. (114a-135a). The District Court found that Arbitrator Nagle buttressed this conclusion with thorough and detailed findings of fact, which embrace the entire factual record relating to the origin and

evolution of the deal and the motives of each of the participants.[7] (16a).

Moreover, the Arbitrator specifically concluded that Tiger's reasons for selling Hall's were *"plausible and valid"* stating:

> . . . recognition of [a] the need to obtain wage concessions in return for an ESOP as a key ingredient for returning Hall's to profitability and the perceived difficulty of securing Teamsters agreement; [b] to such concessions as long as Hall's was owned by Tiger; [c] the belief that competitors were taking business from

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[7]These explicit factual findings included the following:

1. It was becoming very difficult for Tiger to provide the money to Hall's which it needed to continue to operate. (120a, 122a).
2. An essential key to turning Hall's around was to secure wage concessions from union employees in return for establishing an employee stock ownership plan ("ESOP"). (116a).
3. It would have been difficult to obtain union agreement to an ESOP with Tiger owning Hall's. (118a).
4. Bodford, the principal shareholder of the entity which acquired Hall's, agreed. (116a).
5. The delay occasioned by attempting to negotiate an ESOP while owned by Tiger may have put the Company in a position which would have discouraged any potential purchaser. (118a-119a).
6. Hall's had a greater chance of becoming profitable outside of Tiger's ownership. (119a).
7. Tiger had a reasonable expectation of lender unwillingness to provide additional monies for Hall's. (121a).
8. "It seems undeniable that Tiger sought to dispose of Hall's, at least in substantial part, because Hall's had for several years, been losing money, and Tiger was becoming increasdingly hard-pressed to provide the funds it would need. As the Third Circuit has recently observed, 'Disposing of an unprofitable operation is a legitimate business purpose.' *See Pension Benefit Guaranty Corp. v. White Consolidated Industries*, 998 F.2d 1192, 1202 (3d Cir. 1993), *quoting Chicago Truck Drivers, Helpers & Warehouse Workers Pension Fund v. Louis Zahn Drug, Co.*, 890 F.2d 1405 (7th Cir. 1989) (transaction designed to relieve [a party] of a part of its business that was producing significant losses is a bona fide sale)." (footnote omitted). (114a).

> Hall's by exploiting the negative image created by Tiger widely-publicized financial difficulties; and [d] the fact that Hall's was losing money and would need further cash infusions which Tiger was hard-pressed to provide and banks were reluctant to lend, thus represent the basic reasons advanced by Tiger for deciding to sell Hall's. *I find these to be entirely plausible and valid reasons.* (121a) (emphasis added).

In this context, *Santa Fe* actually *undermines* the Fund's position. The *Santa Fe* Court specifically recognized that if it is better to sell stock to preserve a company as a going concern rather than to sell the assets (and thereby trigger withdrawal liability under some circumstances), then it is reasonable to infer that withdrawal liability is only a minor factor in the decision to sell, if a factor at all. *Santa Fe*, 22 F.3d at 729.[8]

After summarizing and analyzing the testimony of both Tiger's expert witness, Dr. Linneman, and the Fund's expert witness, Mr. Hempstead, the Arbitrator specifically concluded that "[i]n view of these considerations, and my conclusion that at that time there were realistic prospects for the Company's continued viability, *I do not find that the sale of Hall's as a going concern, rather than its liquidation, reflected an evasive purpose.*" (132a) (emphasis added).

The Arbitrator and the District Court's analyses, affirmed by the Third Circuit, were correct under the standards articulated in both *Dorn's* and *Santa Fe*.

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[8]It is true that applying this formulation the Seventh Circuit set aside the arbitrator and the district court's conclusions in *Sante Fe* that there was no evasion or avoidance of withdrawal liability. It did so, however, only on a truly remarkable factual record of evasive intent which, as the District Court and the Arbitrator both held, was glaringly different from the record in the case at bar. (16a, 114a-135a).

B. The Fund's "Partnership Approach" Or "Accrual Theory" To Withdrawal Liability Is Mere Hyperbole And Is Simply An Attempt By the Fund To Distort Law.

The Fund advances a novel so-called "Partnership Approach" or "Accrual Theory" to withdrawal liability. The Arbitrator and the District Court correctly rejected this unsupported theory when it bore the earlier moniker of the "Accrual Theory". (21a, 141a). Resuscitated as the "Partnership Approach", it was again rejected by the Court of Appeals.

The theory has been rejected by every court that has considered it. Contrary to the Fund's position, the Arbitrator and the Courts' rejection of this theory hardly opens the floodgates to the "dumping" of pension liability. Nor does it present any other important public policy issue.[9]

As the District Court properly determined, the "Partnership/Accrual" theory proceeds on a flawed definition of the "employer" and then requires a further flawed analysis of *when* withdrawal liability arises. (19a-20a). The Fund's claim — that Tiger, a *former* controlled group member, is *both* the "successor" employer *and* the "original" employer responsible for

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[9]The Fund contends that the Third Circuit's decision will ". . . eviscerat[e] the prohibitions on evasion of pension liability", and ". . . places the public at risk on more than $80 Billion of unfunded pension liability. . . ." (Pet. at 23). That contention is totally unfounded and misguided. Congress has adopted a method for determining a company's liability for unfunded pension benefits. 29 U.S.C. §§ 1381-1461. The Third Circuit's decision in this case does not impact on that method, especially in light of the Arbitrator's dual analysis under the standards the Fund asserts are articulated in *Santa Fe* and *Dorn's*, *supra*. In enacting ERISA, Congress created a detailed structure to safeguard pensions. Federal Express painstakingly adhered to this structure and its procedural safeguards. The Fund now seeks to have this court rewrite ERISA in the guise of reviewing this decision simply because it wants to relitigate the results of three independent tribunals. Contrary to the Fund's contention, there is no threat to the public — Federal Express, the Fund, the Arbitrator, the District Court, and the Court of Appeals, by each requiring strict adherence to ERISA, made sure of that.

withdrawal liability — fundamentally misconstrues MPPAA, misapplies pertinent judicial and administrative interpretations, and cannot be squared with the plain terms of the Act. Not only is there no conflict among the circuits on this illogical theory, there is no legal support whatsoever for the Fund's "Accrual Theory". It has been thoroughly discredited.[10]

Arbitrator Nagle, a recognized expert in federal pension law, squarely rejected the Fund's "convoluted arguments", which selectively borrow inapplicable tax rules and partnership law to support the discredited "Accrual Theory".[11] The

[10]To uphold liability under MPPAA on the basis of the so-called "Accrual Theory" would, as one court stated in a case directly on point, require "engaging in legal gymnastics in order to guarantee pension plans at all costs." *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking Line*, 698 F.Supp. 698, 702 (W.D. Mich. 1987), *aff'd*, 857 F.2d 1107 (6th Cir. 1988). Such a result clearly was not intended by Congress. The "Accrual Theory" contradicts applicable law, which recognizes that only entities that are in the controlled group on the date of withdrawal may be responsible for withdrawal liability. *Id.*

[11]In rejecting the Fund's arguments on this issue, the Arbitrator held:

> This attempt [by the Fund] to fasten liability on former controlled group members is contrary to the so-called snapshot approach to withdrawal liability, under which liability extends only to the contributing entity and those who are members of its controlled group as of the date of withdrawal. This is the approach that has been adopted by the courts, including the Third Circuit in *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118 (3d Cir. 1986), as well as by the Pension Benefit Guaranty Corporation. Moreover, the Fund's Accrual Theory has been specifically rejected by the courts that have considered it, as lacking any support in the statute or its legislative history. *Teamsters Pension Trust v. Central Michigan Trucking, Inc.*, 698 F. Supp. 698 (W.D. Mich. 1987), *aff'd*, 857 F.2d 1107 (6th Cir. 1988); *Teamsters Pension Trust Fund v. Headley's Express and Storage Company*, 1993 WL 189933 (E.D. Pa. June 3, 1993).
>
> The Fund's convoluted arguments for its Accrual Theory — which to a significant degree are based on analogies to tax rules and other areas of law — have been discussed at length by the District Court and by the Sixth Circuit in their *Central Michigan Trucking* decisions, and I see nothing to be gained by repeating those analyses, with which I fully agree. (137a-138a).

Fund incorrectly asserts that the Third Circuit's rejection of the "Partnership Approach" or "Accrual Theory" conflicts with the Second Circuit's decision in *Trustees of Amalgamated Insurance Fund v. McFarlin's, Inc.*, 789 F.2d 98 (2d Cir. 1986). (Pet. at 25). *McFarlin's* is distinguishable. *McFarlin's* did not involve the determination of whether a successor or original employer could be held liable for withdrawal liability at all. It involved the question of whether an employee benefit plan's bankruptcy claim for withdrawal liability could properly be considered a priority claim under Section 507 of the Bankruptcy Code. *See* 11 U.S.C. § 507. In determining whether the claim could be classified as a priority claim under the Bankruptcy Code, the Court's analysis focused on the period of time in which the employees covered by the plan worked. *McFarlin's*, 789 F.2d at 103. The analysis is wholly inapplicable to the issue in this case, whether a company is *liable* for withdrawal liability under MPPAA.

This discredited approach to withdrawal liability involves no issue warranting review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: February 19, 1997